IN THE

Supreme Court of the United States

October Term, 1978

No. 79-163

FREDERICK J. HOPMANN,
Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondent

Petition For Writ Of Certiorari To The Court of Civil Appeals For The Twelfth Supreme Judicial District Of Texas

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SUBJECT INDEX

LIST OF AUTHORITIES

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Frederick J. Hopmann, the petitioner herein, prays that a writ of certiorari issue to review the judgment of The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas entered in the above-entitled case on May 3, 1979.

OPINIONS BELOW

The opinion of The Court of Civil Appeals for the Twelfth Judicial District of Texas is unreported and is printed in Appendix A hereto, *infra,* page A-1. The judgment of The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas is printed in Appendix D hereto, *infra,* page D-3. The Order Sustaining Defendant's Plea of Privilege of the 113th Judicial District Court of Harris County, Texas is printed in Appendix D hereto, *infra,* page D-1.

JURISDICTION

The judgment of The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas (Appendix D, *infra* page D-3) was entered on May 3, 1979. A timely petition for rehearing was denied on May 31, 1979 (Appendix C, *infra,* page C-18). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

Jurisdiction of this Court is authorized by 28 U.S.C. § 1257(3) because petitioner has received judgment from the highest court in the State from which a decision could be had.

The Texas Supreme Court has jurisdiction in a case only when such jurisdiction is conferred upon it by the statutes and Constitution of the State. Article V., Section 3 of the Texas Constitution outlines the general parameters of Texas Supreme Court jurisdiction.[1] This Article is modified and supplemented by certain Articles of the Texas Revised Civil Statutes including Articles 1728 and

1. Tex. Const., Art. V., § 3. Appendix B.

1821.[2] Subsection 3 of Article 1728 confers jurisdiction on the Texas Supreme Court in appeals involving the construction and validity of statutes necessary to a determination of the case. Since this case involves just such an appeal it seemingly falls under the jurisdiction of the Texas Supreme Court. But Subsection 5 of Article 1821 provides that judgments of the Court of Civil Appeals are final and that no writ of error shall be allowed from the Supreme Court in an appeal from an interlocutory order unless there is dissent among the Justices of the Court of Civil Appeals or a conflict of decisions with another Texas Court of Civil Appeals or the Supreme Court.

The Texas Supreme Court in *State v. Wynn,* 301 S.W. 2d 76 (Tex. Sup. Ct., 1957) held that these two Articles should be looked at contemporaneously and in case of a conflict Article 1821 should control. The Court, *per curiam,* said:

> "For [Texas] Supreme Court jurisdiction to attach in the absence of special statutory provision, it is not only necessary that a cause come within the authorizing clauses of Article 1728, but also that it not be precluded by the prohibition of Article 1821." 301 S.W.2d 76, 78.

The case at bar deals with an interlocutory order of the trial court concerning proper venue. There is neither a dissent among the Justices of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas nor is there a conflict of decisions with another Texas Court of Civil Appeals or the Supreme Court. Therefore under Article 1821 the Texas Supreme Court lacks jurisdiction

2. Vernon's Ann. Civ. St., Art. 1728. Appendix B. Vernon's Ann. Civ. St., Art. 1821. Appendix B.

in this case. The Texas Supreme Court addressed this exact issue in *Torrez v. Maryland Casualty Company*, 363 S.W.2d 235 (Tex. Sup., 1962). The court held that the Texas Supreme Court lacked jurisdiction to review the judgment of the Court of Civil Appeals rendered on appeal from an interlocutory venue order even though the construction and validity of a statute was involved. This means that in going to the Court of Civil Appeals petitioner has reached the highest court in the state with jurisdiction over the matter. The only recourse for justice left for petitioner is the Supreme Court of the United States.

QUESTION PRESENTED

Whether the Texas Venue Statute, Vernon's Annotated Texas Statutes (herein V.A.T.S.), Art. 1995, § 25, construed as being mandatory, is unconstitutional because it denies substantial federal rights granted under the Federal Employer's Liability Act, 45 U.S.C. § 56, and thereby thwarts the express purpose of the Act.

STATUTES AND CONSTITUTIONS INVOLVED

This case involves that part of the Federal Employer's Liability Act, 45 U.S.C. § 56, which deals with venue:

> "Under this chapter an action may be brought in a district court of the United States, in the district of residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

This case also involves 28 U.S.C. § 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or law of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

This case also involves the Texas Venue Statute, V.A.T.S., Art. 1995, § 25:

> "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:
>
> * * *
>
> 25. Railway personal injuries—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resides at the time of the injury. If the defendant railroad corporation does not operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury

occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has any agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a non-resident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office."

This case also involves V.A.T.S. Art. 1728, §§ 1, 2, 3, 6:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Court of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

* * *

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the

jurisdiction of the Court of Civil Appeals is made final by statute."

This case also involves V.A.T.S., Art. 1821, § 5:

"Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

* * *

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728."

This case also involves the Due Process and Equal Protection clauses of the 14th Amendment to the Constitution of the United States:

"No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This is a suit brought by an injured brakeman against his railroad employer under the Federal Employers' Liability Act. The trial court granted defendant railroad's plea of privilege to have venue changed from state district court in Harris County, Texas, where petitioner filed suit, to state district court in Bexar County, Texas. Petitioner appealed this decision to the Texas Court of Civil Appeals and that court affirmed the order of the trial court and has since also denied petitioner's timely motion for rehearing. (Appendix D).

Petitioner Hopmann was seriously injured on June 23, 1977 while performing his duties as a brakeman and sued the railroad under the Act (45 U.S.C. § 51, et seq.) for failing to supply him with reasonably safe equipment and a reasonably safe place to work. Appellant was a resident of Bexar County, Texas at the time of the accident and the injury occurred in Caldwell County, Texas.

Defendant Southern Pacific Transportation Company was at all material times doing business in Harris County, Texas. For venue purposes, the railroad resides and is domiciled in Harris County, Texas.

Section 56 of the Act provides that plaintiff may bring suit where the defendant resides and does business. Section 25 of the Texas Venue Statute permits the plaintiff in a suit against the railroad for personal injuries to bring suit only where the plaintiff resides or where the cause of action arose. Both the trial court and the Texas Court of Civil Appeals ruled that the provisions of the Texas Venue Statute are mandatory in a state court proceeding under the federal Act.

Petitioner raised the issue of the constitutionality of a mandatory interpretation of the Texas Venue Statute (Sub. 25, Art. 1995) at the trial level in his Memorandum Brief in Opposition to Defendant's Plea of Privilege. (Appendix C). At the appellate level petitioner again raised the issue in his brief. (Appendix C).

Both courts ruled that the Texas Venue Statute is mandatory and that it takes precedence over the venue provisions of the federal Act.

REASONS FOR GRANTING WRIT

This case concerns the rights of Texas citizens to receive the full protection of the Federal Employer's Liability Act (45 U.S.C. § 51, et seq.). Section 56 of the Act provides that a suit brought under the Act may be brought (a) where the defendant resides; (b) where the cause of action arose; or (c) where the defendant does business.

In *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1948), this Court made it clear that the venue rights provided in the Act were substantial rights. The Court struck down an agreement restricting the employees rights as to venue:

> 'The right to select the forum granted in § 6 is a *substantial right*. It would thwart the *express purpose* of the Federal Employer's Liability Act to sanction defeat of that right by the device at bar." *Boyd*, supra, p. 266 (emphasis added).

In contrast to the federal Act, subsection 25 of the Texas Venue Act (Vernon's Ann. Civ. St. art. 1995, § 25) provides that in a personal injury suit against a

railroad suit shall be brought (a) where the plaintiff resides, or (b) where the accident occurred. This subsection contains no provision to allow a plaintiff to sue a defendant railroad where the later resides or does business.

Texas in this case has construed subsection 25 of Article 1995 to be mandatory. If that is so then plaintiff is denied a substantial right guaranteed by federal law. Indeed, the opinion below recognizes that the injured employee's venue options are substantial rights, but says that the injured employee gives up those right by filing his suit in state court. Here is the way the Texas court put this view of federal rights:

> "The FELA claimant is given the election to sue in the federal court or the state court. Where he chooses to sue in the federal court, the right to select the forum granted by the federal statute constitutes a substantial right which the various states may not defeat. *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949); *Missouri Pacific Railroad Company v. Little*, supra. The substantial right granted, however applies only to the right to maintain venue in accordance with the federal Act in cases filed in the federal courts. Where the injured employee chooses to sue in the state courts, his suit is subject to the venue statutes of the state." p. 4, Tex. Civ. App. opinion, (p. A-8, Appendix A).

In *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), this Court made it clear that rights granted by this Act were not to be disregarded at the state level, especially by technicalities of Texas procedures:

> "The petitioner having asserted Federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We, therefore, cannot accept interpretations that nullify their effectiveness, for . . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."
> *Arnold*, supra, p. 361.

This Court reached the same conclusion in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 (1934). An Alabama court said it did not have jurisdiction over a foreign corporation when the cause of action did not arise in Alabama. This action by the Alabama court was contrary to an express provision of the Act, just as Texas' subsection 25 is by virtue of being mandatory. In reversing the Alabama court's decision, the Supreme Court said:

> "A state may not discriminate against rights arising under Federal laws."
> *McKnett*, supra, p. 234.

In a later FELA case the Supreme Court made this point even more clear:

> "Moreover, only if Federal law controls can the Federal Act be given that uniform application throughout the country essential to effectuate its purpose." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

If subsection 25 of the Texas Statute (V.A.T.S. Art. 1995) is mandatory then it destroys a substantial right

given petitioner by the federal Act and thereby goes against established Supreme Court case law and violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Ever since the Federal Employers Liability Act became law in 1908 the railroads have attempted to amend the Act in order to limit the venue provisions so as to be more favorable to them. In 1947 a bill was introduced in the United States House of Representatives that would have changed Section 56 of the Act to read very much like the more restrictive Texas statute pertaining to railroad personal injury cases. Congress rejected the proposed amendment and has since refused to water down the venue provisions of the Act to make them more favorable to the railroads. During the House Judiciary Committee Hearings on the proposed amendment in 1947 it was noted that:

> "Congress purposely gave great latitude to the injured party in bringing his suit against the wrongdoer in the forum most convenient to the complainant." (Hearings on HR 1639, 80th Congress, 1st Session, 1947, p. 61).

Congress clearly intended to make the prospect of the individual railroad worker suing the railroad corporation less awesome to the railroad worker by allowing suit to be brought wherever the railroad may be found. A mandatory interpretation of the Texas Venue Statute severely limits the rights which the United States Congress saw fit to give the railroad workers and petitioner respectfully submits that for this reason such a mandatory interpretation of the Texas statute makes it unconstitutional.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted, and for all other appropriate relief.

Respectfully submitted,

By: James H. Brannon

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CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of July, 1979, all counsel of record were duly delivered a copy of the above and foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas.

James H. Brannon

JAMES H. BRANNON

APPENDIX A

IN THE COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT
OF TEXAS

TYLER, TEXAS

NO. 1210

FREDERICK J. HOPMANN, Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellee

Appeal From The 113th Judicial District Court
Of Harris County, Texas

This is a venue case. Appellant, Frederick J. Hopmann, brought suit in the district court of Harris County, Texas, under the Federal Employer's Liability Act, 45 U.S.C.A., subsection 51, et seq., seeking to recover damages for personal injuries sustained while employed as a brakeman for appellee, Southern Pacific Transportation Company. The incident was alleged to have occurred on June 23, 1977, at Luling, Caldwell County, Texas. Appellant alleged in his petition that he was a resident of Bexar County, Texas, at the time of the occurrence in question and that the appellee was a railroad cor-

poration engaged in interstate commerce doing business in Harris County, Texas, where it maintained its offices and place of business.

Appellee duly filed a plea of privilege to have the cause transferred to Caldwell County, Texas, or in the alternative, to Bexar County, Texas, relying upon Article 1995, subdivision 25, Vernon's Annotated Texas Civil Statutes. Appellant responded with a controverting affidavit alleging that under Article 1995, supra, venue was properly laid in Harris County due to the fact that appellant does business in Harris County and maintains its offices and principal place of business there. After a hearing before the court, without a jury, the trial court sustained Southern Pacific's plea of privilege and ordered that the cause be transferred to Bexar County, Texas, from which order appellant perfected this appeal.

On the venue hearing, it was stipulated that: (1) plaintiff was employed by defendant, Southern Pacific Transportation Company, on the date of his alleged injury on July 23, 1977; (2) the injury occurred in Caldwell County, Texas; (3) at the time of his injury plaintiff was a resident of Bexar County, Texas; (4) that at all times material to this suit Southern Pacific Transportation Company was doing business in Harris County, Bexar County and Caldwell County; (5) that for the purpose of venue only, it was stipulated that plaintiff's pleading alleged a cause of action for venue purposes under the Federal Employer's Liability Act, and that all necessary facts to support the pleading had been established; and (6) that if the plea of privilege was sustained by the trial court, it was stipulated that plaintiff's suit would be transferred to Bexar County, Texas.

Under the first point, appellant contends that the trial court erred in transferring the cause to Bexar County because federal law governs, and under Title 45, U.S.C.A., subsection 56, this suit was properly brought in Harris County.

Subsection 56 of the Federal Employer's Liability Act provides, in part, as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Appellant takes the position that since the Act provides that the jurisdiction of the federal and state courts shall be concurrent, the state courts are obligated to apply the venue provisions provided by the Act. He argues that the right to select the forum and maintain suit in any county where appellee does business, is a substantial right granted by congress, and to apply subdivision 25 of the Texas Venue Statute would deny him that right and would thwart the express purpose of the Federal Employer's Liability Act.

The railroad company, on the other hand, contends that venue is controlled by subdivision 25 of Article 1995, supra, the material part of which reads as follows:

> "25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for

damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. . . ."

In our view, the precise issue now presented was previously decided in Missouri Pacific Ry. Co. v. Little, 319 S.W.2d 785 (Tex. Civ. App.—Houston 1958, no writ history, cert. den., 80 S.Ct. 69, 194). In the Little Case, the railroad employee brought suit against his employer for personal injuries sustained in McLennan County, Texas. At the time of the accident, plaintiff was a resident citizen of McLennan County, and his injuries occurred while he and his employer were engaged in interstate commerce. The action was brought under the Federal Employer's Liability Act and suit was filed in Houston, Harris County, Texas. At the state district court level, the plaintiff's employer, Missouri Pacific Ry. Co., sought, by way of plea of privilege, to remove the cause to the county in which the plaintiff resided and in which he sustained the injury. Missouri Pacific based its contention on Article 1995, subdivision 25, supra, just as the appellant does in this case. The district court overruled the railroad's plea of privilege and the railroad appealed. The Houston Court of Civil Appeals reversed the case and ordered the cause transferred to McLennan County. In holding that subdivision 25 of the Texas Venue Statute (Article 1995) was controlling and that the venue provisions of section 56 of the Federal Employer's Liability Act were not applicable to suits filed in state courts, the court of civil appeals stated at page 787:

"It is perfectly obvious that in the first sentence of the second paragraph of Section 56 the Congress

was undertaking to establish the venue of suits under the Federal Employers' Liability Act brought in *'a district court of the United States.'* (Emphasis supplied.) Nothing is said concerning the venue of an action that is brought in a state court.

"The legal doctrine that the clear expression of the one excludes the other is so ancient that it comes down to us in the time-honored maxim 'expresso unius est exclusio alterius.'

"After prescribing venue in the United States courts, Section 56 then provides, 'The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.' This provision is concerned with jurisdiction, not venue."

In support of its decision the court of civil appeals cited the case of Miles v. Illinois Central Ry. Co., 1942, 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, involving a Federal Employer's Liability Act case, wherein the court stated at page 788:

" 'Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. *The venue of state court suits was left to the practice of the forum.*' (Emphasis ours.)"

In Baltimore & Ohio Ry. Co. v. Kepner, 1941, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, the Supreme Court held that a state could not validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employer's Liability Act in the federal court of another state, since under the supremacy clause the venue section of the federal Act was controlling. While the ruling in that

regard is irrelevant to the present inquiry, it is significant to note that in the course of the opinion the Supreme Court made this statement at page 9 of 62 S.Ct.: *"Section 6 (45 U.S.C.A. sec. 56) establishes venue for an action in the federal courts."* (Emphasis ours.)

We have found no case, and have been cited none, holding that venue provisions of sec. 56 of the federal statute is applicable to actions filed in a state court. The statements made by the United States Supreme Court in the cases cited above clearly indicate that Section 56 of the Act is to be interpreted as establishing venue for an action in the federal courts and that venue in state court actions are controlled by the venue statutes of the forum. Since appellant filed his suit in the Texas court, the federal venue statute was not applicable. Accordingly, appellant's first point is overruled.

Under the second point, appellant contends that the provisions of subdivision 25 of Article 1995, supra, are not mandatory but were enacted for the benefit of the plaintiff, thus giving him a right to elect to either follow subdivision 25 or to sue appellant at its domicile in Harris County.

It has long been the law in this state that subdivision 25 of Article 1995 is mandatory and that suits controlled by this subdivision must be commenced in the particular county mentioned therein without reference to whether or not it is the domicile of the defendant. Lewis v. Gulf, C. & S.F. Ry. Co., 229 S.W.2d 395 (Tex. Civ. App.—Galveston 1950, writ dism'd); Texas & N.O.R. Co. v. Tankersley, 246 S.W.2d 253 (Tex. Civ. App.—San Antonio 1952, no writ); Missouri Pacific Ry. Co. v. Little, supra; see also Kinney v. McCleod, 9 Tex. 78 (1852).

In Lewis v. Gulf, C. & S.F. Ry. Co., supra at 397, the Galveston court summarized the rights of the parties under the mandatory provisions of Article 1995 in the following language:

> "It is well settled that if a suit is brought under the provisions of any of the mandatory subdivisions above referred to, the defendant is entitled to have the case transferred to the county provided for in such mandatory provision, regardless of defendant's residence, upon the filing of the proper plea."

Applying the foregoing rules of law to the facts of the present case, it is obvious that appellant cannot maintain venue in Harris County, Texas, in face of the mandatory provision of the Texas statute providing otherwise. Appellant's second point of error is overruled.

By the third and final point, appellant argues that if subdivision 25 of Article 1995 is mandatory, then it is unconstitutional because it denies substantial federal rights. Specifically, he contends that if subdivision 25 is mandatory it is unconstitutional because it not only deprives him of one of the substantial rights given to him by the federal Act, but also it discriminates against him and causes a lack of uniformity in the application of the federal Act. However, no authority is cited for this proposition. After considering appellant's argument, we are convinced that it is without merit.

The F.E.L.A. claimant is given the election to sue in the federal court or the state court. Where he chooses to sue in the federal court, the right to select the forum granted by the federal statute constitutes a substantial right which the various states may not defeat. Boyd v. Grand Trunk Western Ry. Co., 338 U.S. 263, 70 S.Ct.

26, 94 L.Ed. 55 (1949); Missouri Pacific Railroad Company v. Little, supra. The substantial right granted, however, applies only to the right to maintain venue in accordance with the federal Act in cases filed in the federal courts. Where the injured employee chooses to sue in the state courts, his suit is subject to the venue statutes of the state. Miles v. Illinois Central Ry. Co., supra; Missouri Pacific Ry. Co. v. Little, supra. It is clear that the Congress did not intend to give the F.E.L.A. claimant who files suit in the state court the same venue rights as those provided for in suits filed in the federal court, otherwise the Congress would have said so. When appellant elected to file his suit in the state court, he no longer had federal venue rights subject to protection. Consequently, the application of the Texas venue statute would not defeat or curtail any of appellant's federal venue rights. Since the Texas venue statute deprived him of no federal right, it follows that it could not be unconstitutional and void on such grounds.

Further, we find that we are unable to agree with appellant's contention that the mandatory provisions of subdivision 25 of Article 1995 renders the Texas statute discriminatory and in violation of the 14th Amendment of the Constitution of the United States. This same question was addressed by the Court in Missouri Pacific Ry. Co. v. Little, supra. After reviewing the Texas statute in question, the court in that case concluded, at page 788, that the statute fully protects the plantiff and could not, in any way, be construed as discriminatory. After a careful review of the statute, we are convinced that the court in that case reached the proper result and that the statute should not be struck down on that basis.

It follows from what we have said that we are of the opinion that appellant had no legal or constitutional right to maintain venue in Harris County, Texas.

Accordingly, the judgment of the trial court is affirmed.

JAMES H. MOORE
Associate Justice

Opinion delivered May 3, 1979.

APPENDIX B

TEXAS STATUTES

Art. 1728. [1521] [940] [1011] Appellate jurisdiction

The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the State.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute. Acts 1892, p. 19; Acts 1913, p. 107; Acts 1917, p. 140; G.L. vol. 10, p. 383; Acts 1927, 40th Leg., p. 214, ch. 144, § 1; Acts 1953, 53rd Leg., p. 1026, ch. 424, § 1.

Art. 1821. [1591] [996] Judgment conclusive on law

Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law

and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute.

2. All cases of slander.

3. All cases of divorce.

4. All cases of contested elections of every character other than for State officers, except where the validity of a Statute is questioned by the decision.

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

6. In all other cases as to law and facts except where appellate jurisdiction is given to the Supreme Court and not made final in said Courts of Civil Appeals.

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728. Acts 1st C.S. 1892, p. 25; Acts 1923, p. 110; Acts

1929, 41st Leg., p. 68, ch. 33, § 1; Acts 1953, 53rd Leg., p. 1026, ch. 424, § 2.

Art. 1995. [1830] [1194] [1198] Venue, general rule

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

* * *

25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

* * *

TEXAS CONSTITUTION

Article V

§ 3. Jurisdiction of Supreme Court; writs; sessions; clerk

Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdection on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter,

be required by law, and he may hold his office for four years and shall be subject to rermoval by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide. As amended Aug. 11, 1891; Nov. 4, 1930.

FEDERAL STATUTES

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

§ 1257. State courts; appeals; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

UNITED STATES CONSTITUTION

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

NO. 1872

IN THE COURT OF CIVIL APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, Appellee

BRIEF FOR APPELLANT

SCHMIDT & MATTHEWS
James H. Brannon
810 Houston Bar Center Building
723 Main Street
Houston, Texas 77002
713/223-4466

PRINTER'S NOTE:

Index for Brief Omitted

NO. 1872

IN THE COURT OF CIVIL APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, Appellee

BRIEF FOR APPELLANT

To The Honorable Court Of Civil Appeals:

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the trial court's Order granting Appellee's Plea of Privilege to transfer this cause of action out of Harris County, where it was filed. (Tr. 14).

Appellant, an employee of Appellee, was seriously injured on June 23, 1977 while performing his duties as a brakeman. Appellant sued under the Federal Employers Liability Act (45 U.S.C.A. § 51, et. seq.) for failing to supply him with reasonably safe equipment and a reasonably safe place to work. Appellant was a resident of Bexar County at the time of the accident and the injury occurred in Caldwell County.

Defendant-Appellee Southern Pacific Transportation Company was at all material times doing business in Harris County as stipulated in the Statement of Facts, page 4. For venue purposes, the railroad resides and is domiciled in Harris County.

Appellee filed a Plea of Privilege on January 11, 1978 to move the cause of action either to the county where the accident occurred or where Appellant resided. (Tr. 6) Appellant filed an Amended Controverting Plea to Defendant's Plea of Privilege. (Tr. 11)

The Trial Judge upheld Defendant's Plea of Privilege. (Tr. 14) It is from that Order that Appellant has perfected this appeal.

FIRST POINT OF ERROR

THE TRIAL COURT ERRONEOUSLY SUSTAINED APPELLEE'S PLEA OF PRIVILEGE BECAUSE FEDERAL LAW GOVERNS AN FELA CASE AND UNDER 45 U.S.C.A., § 56 THIS SUIT WAS PROPERLY BROUGHT IN HARRIS COUNTY.

ARGUMENT AND AUTHORITIES

The present venue provisions of the FELA were adopted by amendment on April 5, 1910. The Amendment provides for an FELA suit to be brought (a) where the defendant resides; (b) where the cause of action arose; or (c) where the defendant does business. 45 U.S.C.A. § 56.

These rights were given to the plaintiff in order to equalize what Congress felt was an inherently disproportionate bargaining power between the railroads and their

employees. In *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1948), the Supreme Court struck down an agreement restricting the employees rights as to venue. In doing so the Court used this language:

> "The right to select the forum granted in § 6 is a *substantial right*. It would thwart the *express purpose* of the Federal Employer's Liability Act to sanction defeat of that right by the device at bar." *Boyd*, supra, p. 266 (emphasis added)

The significance of the venue provisions is not only attested to by this particular case but also by the railroads' repeated efforts to change them and Congress' adamant stand to preserve them (Hearings on HR 1639, 80th Congress, 1st Session, 1947). During these hearings on the FELA venue provisions in 1947, it was noted that

> "Congress purposely gave great latitude to the injured party in bringing his suit against the wrongdoer in the forum most convenient to the complainant." (HR, supra, p. 61)

This shows not only that plaintiff has these rights but that they are substantial rights to be guaranteed by the courts. Texas courts have recognized that substantial rights of the FELA may not be undermined by any "local statute, rule of decision, or forms of local practice." *Texas & P. Ry. Co. v. Younger*, 262 S.W.2d 557, 560 (Ft. Worth Civ. App., 1953, ref. n.r.e.)

Appellee cited at the plea of privilege hearing the case of *Missouri Pacific Railroad Co. v. Little*, 319 S.W.2d 785 (Houston Civ. App., 1958, Cert. denied, 80 S.Ct. 69, 194) as holding that state venue provisions govern

FELA actions filed in state courts. In that case the court suggested (p. 788) that venue at the defendant's residence was not a substantial right of the injured railroad employee. In *Little* the court in reaching its decision relied on this dictum of the U.S. Supreme Court in *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698, 703, 62 S.Ct. 827, 86 L.Ed. 1129 (1942):

> "The venue of state court suits was left to the practice of the forum."

However, in *Miles* the court was not faced with a venue provision which was contrary to the federal Act. The Supreme Court in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 425, 85 S.Ct. 1050, 13 L.Ed.2d 94 (1965) was faced with an Ohio statute, similar to Texas', which was apparently contrary to the FELA venue provisions. This case was reversed on other grounds but conspicuous in its absence was any approval by the Court of the Ohio venue statute. In fact, the Court hinted in footnote 1 (85 S.Ct. at 1053) that this type of restriction might be unconstitutional. Plaintiff submits that the venue provisions of the FELA are to govern in this case because they are substantial rights and any undermining of these provisions would be contrary to the purposes of the Act. Therefore, the Court should overrule Appellee's Plea of Privilege as contrary to Federal law.

SECOND POINT OF ERROR

THE TEXAS VENUE STATUTE (SUB. 25, ART. 1995) IS NOT MANDATORY AS THE EXCEPTIONS LISTED THEREUNDER ARE FOR THE BENEFIT OF THE PLAINTIFF AND DO NOT RESTRICT THE GENERAL VENUE PROVISION.

ARGUMENT AND AUTHORITIES

Even if it is found that state venue law governs, Appellee's Plea of Privilege fails because under state law this case is properly brought in Harris County, Appellee's domicile. Subdivision 25 of Article 1995 provides that in a railroad personal injury case, suit shall be brought (a) where the plaintiff resides, or (b) where the accident occurred. Article 1995 contains the exceptions to the general venue provision that the defendant has the right to be sued in the county of his residence. The exceptions to the general venue provision are generally recognized to be for the benefit of the plaintiff not the defendant. *Warren v. Denison,* 531 S.W.2d 215, 217 (Amarillo Civ. App., 1975, no writ).

In *Commercial Standard Ins. Co. v. Texas & N.O.R. Co.,* 198 S.W.2d 913 (Ft. Worth Civ. App., 1946, no writ) the defendant railroad was being sued by the injured employee's insurance company in a "compensation recoupment suit". The railroad filed a Plea of Privilege to be sued only at its residence which was sustained by the trial court. In answering appellant-insurance company's claim that Subsection 25 was mandatory the Court of Appeals said this:

> "We disagree with appellant's statement in its brief to the effect that Sec. 25 does not provide for venue to be in appellee's resident county. We find it is a protective statute which guarantees appellee venue in its home county, if the exceptions set out in said Section are not applicable." *Commercial Standard Ins. Co.,* supra, p. 916.

The case of *Fouse v. Gulf C. & S.F. Ry. Co.,* 193 S.W. 2d 241 (Ft. Worth Civ. App., 1946, no writ) also assumed that Subsection 25 was not mandatory. In this action plaintiffs resided and were injured in Johnson County, the defendant railroad was domiciled in Galveston County, and suit was brought in Tarrant County. The railroad filed a plea of privilege to move the case to Galveston County and the plaintiffs asked to either keep the case in Tarrant County or move it (under Subdivision 25) to Johnson County. The Court sent the case to Galveston County which would be improper if Subsection 25 is mandatory. Also, the language of the Court's opinion clearly shows that they felt Subdivision 25 was *not* mandatory.

> "In other words, these plaintiffs, had they chosen to do so, *could have brought this personal injury suit in the district court of Galveston County,* and no one could have questioned their right to do so." *id* at 244. (emphasis added)

One Texas case has held in an FELA action that Subsection 25 is mandatory so that the railroad could move the case from its domicile to the place of the injury. *Lewis v. Gulf C. & S.F. Ry. Co.,* 229 S.W.2d 395 (Galveston Civ. App., 1950, writ dism'd). We submit that the *Lewis* case is wrong. However, the opinion makes no mention of the venue provisions of the FELA, or of their impact on Texas venue rules.

THIRD POINT OF ERROR

IF SUBDIVISION 25 OF ARTICLE 1995 IS MANDATORY THEN IT IS UNCONSTITUTIONAL BECAUSE IT DENIES SUBSTANTIAL FEDERAL RIGHTS TO BE GUARANTEED BY THE STATE COURTS.

ARGUMENT AND AUTHORITIES

Seven (7) years after the *Lewis* case, *supra,* the U. S. Supreme Court rejected a Texas holding in a similar situation (i.e., where the Texas Courts purported to be simply following state "procedure" in submitting a case to the jury), saying:

> "The petitioner having asserted Federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We, therefore, cannot accept interpretations that nullify their effectiveness, for . . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Arnold v. Panhandle and Santa Fe Railway Co.,* 353 U.S. 360, 361, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957).

As mentioned earlier, the U. S. Supreme Court in *Boyd* decided that the plaintiff's right to venue is a substantial right. The Supreme Court has a history of looking closely at state actions or statutes which defeat one of the express purposes of a Federal law. In *McKnett v. St. Louis & S. F. Ry. Co.,* 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 (1934) an Alabama Court said they did not have jurisdiction over a foreign corporation when the cause of action did not arise in their state. This action by the Alabama Court was contrary to an express provision of the FELA, just as Texas' Subdivision 25 would be if it is mandatory. In reversing the Alabama Court's decision, the Supreme Court said:

> "A state may not discriminate against rights arising under Federal laws." *McKnett,* supra, p. 234.

In a later FELA case the Supreme Court made this point even clearer:

> "Moreover, only if Federal law controls can the Federal Act be given that uniform application throughout the country essential to effectuate its purpose." *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

If Subdivision 25 is mandatory as Appellee contends then it is unconstitutional because it destroys one of the substantial rights given to the plaintiff by the Federal Act. Subdivision 25, if mandatory, discriminates against plaintiff's rights and causes there to be a lack of uniformity in the application of the Act.

Burnett, supra, p. 425 (footnote 1) suggests that a venue statute similar to Texas' might be unconstitutional. The Court did not answer it directly in that case because they were able to reverse on other grounds. However, a state statute which diminishes the rights of the party intended to benefit from the FELA and enhances the right of the railroad, the party to be regulated, is unconstitutional under the doctrine set out by the Supreme Court in *Boyd, McKnett,* and *Arnold.* Therefore, Appellant submits that if Subdivision 25 is mandatory as to him then it is unconstitutional. It denies Due Process and violates the Equal Protection clauses; both under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION AND PRAYER

Appellant submits that Federal law governs an FELA case and under 45 U.S.C.A. § 56 this suit was properly

brought in Harris County. In the alternative, if this Court rules state law governs, Appellant submits that Subdivision 25 of Article 1995 is not mandatory and would be so contrary to Federal law if it is mandatory that it is unconstitutional.

Appellant prays that this Honorable Court reverse and render the trial court's action in sustaining Appellee's Plea of Privilege.

Respectfully submitted,

SCHMIDT & MATTHEWS

By: _____

James H. Brannon
810 Houston Bar Center Building
723 Main Street
Houston, Texas 77002
713/223-4466
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 1978, a true and complete copy of the above and foregoing Brief for Appellant was served upon Appellee's attorney of record by hand delivering a copy of same to Mr. W. T. Womble, 913 Franklin Avenue, Houston, Texas, 77002.

_____

JAMES H. BRANNON

NO. 1,147,334

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

FREDERICK J. HOPMANN

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANT'S PLEA OF PRIVILEGE

James H. Brandon
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810 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002
Telephone: 223-4466

Attorneys for Plaintiff

To The Honorable Judge Of Said Court:

I.

Plaintiff is an employee of defendant railroad, who was injured on the job, and this suit is brought under the "Federal Employers' Liability Act", 45 U.S.C.A. §§ 51-60.

The railroad filed a plea of privilege to move the case away from its county of residence (Harris).

Plaintiff controverted this plea and the railroad insists that the case must be transferred under Subdivision 25 of Article 1995, Vernon's Annotated Texas Statutes, which the railroad argues is mandatory.

Plaintiff urges this Court to overrule the plea of privilege, because Federal law governs an FELA case, and under Federal law the suit is properly brought in Harris County. Suit in Harris County is also proper under Subdivision 27 of Article 1995 pertaining to foreign corporations.

A. *Venue Under FELA.*

The present venue provisions under the FELA were adopted April 5, 1910. These amended venue provisions were adopted because prior to them venue was limited to the place of business of the railroad. The Amendment permitted (and to this day permits) an FELA suit in Federal Court to be brought (a) where the defendant resides; (b) where the cause of action arose; or (c) where the defendant does business. 45 U.S.C.A. § 56.

These venue provisions represent substantial rights of the FELA plaintiff. The United States Supreme Court in

striking down an agreement on venue between the railroad and the injured employee, said in a 1949 case:

> "The right to select the forum granted in § 6 is a substantial right." *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55.

In fact, attempts have been made to change them so that suit could only be brought either (a) where the plaintiff resides, or (b) where the accident occurred (HR 1639, 80th Congress, 1st Session, 1947). These attempts have failed, but they illustrate the importance of the FELA venue provisions—the railroads were still fighting them 37 years after they were adopted!

The Supereme Court of Iowa had this to say about state legislation restricting plaintiff's choice of forum:

> "With respect to a right arising under the Constitution or Laws of the United States the decision of the Courts of the United States is controlling upon the state court. [citations omitted]. It necessarily follows that Chapter 293 of the Acts of the Thirty-Seventh General Assembly cannot operate to prevent one claiming under the Federal Employer's Liability Act from bringing suit in any court, where, under that act, he is authorized to sue." *Payne v. Knapp,* 197 Iowa 737, 198 N.W. 62 (1924).

B. *Texas Venue (Sub. 25, Art. 1995).*

Subdivision 25 was enacted in 1901, at just about the same time as the United States Congress was considering the original "Federal Employers' Liability Act".

Our Texas venue statute is more accommodating to the railroads; in 1901 they wielded enormous political

power in Texas. Subdivision 25 to Article 1995 reflects precisely what the railroads were unsuccessfully trying as late as 1947 to pass through Congress: in a railroad personal injury case, suit shall be brought (a) where the plaintiff resides, or (b) where the accident occurred.

The effect then is to turn the FELA on its head: you can sue the railroad where it resides in Federal Court, but you cannot in state court. For some reason, railroads no longer like being sued where they reside. All this in a state where we have the general philosophy—expressed in Article 1995—that a defendant has the right to be sued in the county of his domicile (residence).

Two cases have dealt with whether or not Subdivision 25 is "mandatory" so that the plaintiff simply cannot sue the defendant railroad where it resides. These cases seem to disagree on the "mandatory" nature of Subdivision 25.

1. In *Fouse v. Gulf C. & S. F. Ry. Co.,* 193 S.W.2d 241 (Ft. Worth Civ. App., 1946, no writ) the plaintiffs resided and were injured in Johnson County, the defendant railroad was domiciled in Galveston County, and suit was brought in Tarrant County. The railroad's plea of privilege asked that the case be moved to Galveston County, and the plaintiffs asked to either keep it in Tarrant County or move it (under Subdivision 25) to Johnson County.

The Court sent the case to Galveston County, which would be improper if Subdivision 25 is "mandatory". As the Court said:

> "The plea of privilege is a creature of the law enacted for the benefit of the defendant. Only the exceptions thereto are enacted for the benefit of the plaintiffs." (*id* at 244)

2. One Texas case has held in an FELA case that Subdivision 25 is mandatory, so that the railroad, sued in its domicile (Galveston) by an employee, could move the case to the county of injury—which also happened to be the county of plaintiff's residence (Hardin). Had the plaintiff sued in Federal Court sitting at Galveston, he could have (under 45 U.S.C.A. § 56) had his case tried there rather than in Hardin County. *Lewis v. Gulf C. & S. F. Ry. Co.,* 229 S.W.2d 395 (Galveston Civ. App., 1950, writ dism'd). We submit that this case is wrong. The battle over venue provisions of the FELA demonstrates that it is an important right for the plaintiff to be able to sue the railroad where 45 U.S.C.A. § 56 permits.

The point here presented was not discussed in the *Lewis* case, i.e. that substantial Federal rights were being trenched upon by the Texas venue statute. In fact, it was not until 7 years after the *Lewis* case that the U. S. Supreme Court rejected a Texas holding in a similar situtation, saying:

> "The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore, cannot accept interpretations that nullify their effectiveness, for '. . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' " *Arnold v. Panhandle and Santa Fe Railway Co.,* 353 U.S. 360, 361, 77 S.Ct. 840, 841 (1957).

Plaintiff submits that if Subdivision 25 is mandatory, it is unconstsitutional. See *Burnett v. New York Central Railroad Company,* 380 U.S. 424 (footnote 1, p. 425), 85 S.Ct. 1050 (1965).

One other problem with calling Subdivision 25 mandatory is that it does not tell us which county to send the case to—Jim Wells (where plaintiff resides) or Nueces (where the accident occurred). With one possible exception (Subdivision 29, Libel and Slander) the mandatory subdivisions are quite specific as to where the case shall be filed, and only one county is possible. Since that is not true with respect to Subdivision 25, it is not clear that the Legislature was forcing (rather than simply permitting) plaintiff to sue the defendant railroad away from its county of residence.

CONCLUSION AND PRAYER

Plaintiff has sued defendant where it resides and where it does business in Texas, so that under Federal law (45 U.S.C.A. § 56) Harris County is a proper county to sue in; and under Article 1995, Subdivision 27, as set out in plaintiff's Amended Controverting Plea, Harris County is where defendant foreign corporation has an agency or representative, and its principal office in Texas, so that under state law venue is proper in Harris County. Therefore, the plea of privilege, since it attempts to invoke Subdivision 25 and that subdivision is not mandatory in an FELA case. should be overruled. Plaintiff so prays.

Respectfully submitted,

SCHMIDT & MATTHEWS

By: _____
JAMES H. BRANNON
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the ____day of_____, 1978, a true and correct copy of the above and foregoing Memorandum Brief In Opposition To Defendant's Plea Of Privilege, was duly deposited in the United States Postal Service, certified mail, return receipt requested, to the attorney of record for the Defendant in this matter, Mr. W. T. Womble, 913 Franklin Avenue, Houston, Texas, 77001, and on the same date the original of said Memorandum Brief was duly filed with the Clerk of the above referenced Court.

_____
JAMES H. BRANNON

NO. 1210

IN THE COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT
OF TEXAS
TYLER, TEXAS

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Appellee

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CIVIL APPEALS:

COMES NOW Appellant, Frederick J. Hopmann, and files this his Motion for Rehearing pursuant to Rule 458 of the Texas Rules of Civil Procedure, and moves this Court to set aside its decision rendered on the 3rd day of May, 1979, affirming the Judgment of the Trial Court in favor of Appellee, to grant Appellant a rehearing and to withdraw the opinion handed down on the 3rd day of May, 1979, and to reverse the Judgment of the Trial Court.

In support of this Motion for Rehearing, Appellant presents the following Assignments of Error:

FIRST ASSIGNMENT OF ERROR

The Court erred in overruling Appellant's First Point of Error because Federal law governs an FELA case and venue in Harris County is proper under Federal law.

SECOND ASSIGNMENT OF ERROR

The Court erred in overruling Appellant's Second Point of Error because the Texas Venue Statute (Sub. 25, Art. 1995) is not mandatory.

THIRD ASSIGNMENT OF ERROR

The Court erred in overruling Appellant's Third Point of Error because if Subdivision 25 of Article 1995 is mandatory then it is unconstitutional.

ARGUMENT

This Court, in its Opinion handed down the 3rd of May, 1979, stated:

> "It is clear that the Congress did not intend to give the FELA claimant who files suit in the state court for the same venue rights as those provided for in suits filed in the federal court, otherwise the Congress would have said so. . . ."

Conversely, can it not be said that if the Congress had not intended for the FELA venue provisions to be concurrent with that of state courts why did Congress not limit an injured railroad employee's forum to a Federal court only? Congress gave the injured railroad employee two forums to choose from, i.e. Federal court or state court. If the venue provisions of Sec. 56 of the FELA are not applicable to actions filed in state court, as this Court has held in its Opinion, why did Congress give the injured railroad worker the option of filing in a state court? Therefore, the right to select the forum, as granted by this Federal statute, constitutes a substantial right which the various states may not defeat. Why is it being

defeated here? The Court recognizes that venue constitutes a substantial right in its opinion.

This Court has held that Subdivision 25 of Article 1995 is mandatory and not unconstitutional as to this Appellant. Any ruling that usurps a Federal right governed by Federal law is unconstitutional. Since the Federal act was enacted to protect the rights of injured railroad employees, and since Federal rights are governed by Federal law, the FELA venue provisions would govern an FELA case, and Subdivision 25 of Article 1995 would govern all other personal injury lawsuits brought in the State of Texas against a railroad.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court grant this Motion for Rehearing, that the opinion handed down on the 3rd day of May, 1979, be withdrawn and the affirmation of the Judgment of the trial court be in all things vacated, set aside and annulled.

Respectfully submitted,

SCHMIDT, MATTHEWS &
BRANNON

By: _____

JAMES H. BRANNON
810 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002
Telephone: 713/223-4466
Attorneys for Appellant,
Frederick J. Hopmann

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 1979, a true and correct copy of the above and foregoing Pleading was duly hand delivered to attorney of record for Defendant, Mr. W. T. Womble, Crain, Caton, James & Oberwetter, 3300 Two Houston Center, Houston, Texas, 77002; and on the same date the original of said pleading was duly filed with the District Clerk of Harris County, Texas to be filed among the papers of this cause.

_____

JAMES H. BRANNON

APPENDIX D

NO. 1,157,849

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

FREDERICK J. HOPMANN

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

ORDER SUSTAINING DEFENDANT'S PLEA OF PRIVILEGE

On the 13th day of March, 1978, the Court, after hearing and considering Defendant's Plea of Privilege and Plaintiff's Controverting Plea, and to the evidence and argument of counsel thereon, is of the opinion that the Plea of Privilege should be sustained.

It is therefore ordered that Defendant's Plea be sustained, and that the cause of action alleged against Defendant in the suit styled and numbered above be transferred to the _____ District Court of Bexar County, Texas. It is further ordered that the Clerk of this Court transmit to the Clerk of the _____ District Court of Bexar County, Texas, certified copies of the original papers in this cause and a transcript of all proceedings had herein, duly certified, and that costs incurred in this Court be taxed against Plaintiff.

Signed on March 13, 1978.

/s/ THOMAS STOVALL, JR.
Judge Presiding

APPROVED AS TO FORM:

Southern Pacific Transportation Company

By: /s/ W. T. WOMBLE
W. T. Womble
Attorney for Defendant

Schmidt & Matthews

By: /s/ JAMES H. BRANNON
W. Douglas Matthews
Attorney for Plaintiff

IN THE
COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT TYLER

JUDGMENT RENDERED MAY 3, 1979

1210 FREDERICK J. HOPMANN VS. SOUTHERN PACIFIC TRANSPORATION COMPANY — Appeal from 113th Judicial District Court of Harris County

AFFIRMED—Opinion by Associate Justice James H. Moore

THIS CAUSE came on to be heard on the transcript of the record; and the same being inspected it is the opinion of the Court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court below sustaining Appellee's plea of privilege and ordering that the cause be transferred to a District Court of Bexar County, be in all things affirmed; that the Appellee, Southern Pacific Transportation Company, recover of and from the appellant, Frederick J. Hopmann, and from Fidelity and Deposit Company of Maryland, surety upon appellant's appeal bond, all costs in this behalf expended, both in this Court and the Court below for all of which execution may issue, and that this decision be certified to the court below for observance.

D-4

COURT OF CIVIL APPEALS
Twelfth Supreme Judicial District
306 County Courthouse
Tyler, Texas 75702

Notice of Judgment

Barbara A. Holman
Clerk
(214) 593-8471

May 31, 1979

Mr. James H. Brannon
Schmidt & Matthews
810 Houston Bar Center Bldg.
723 Main Street
Houston, TX 77002

Mr. W. T. Womble
Attorney at Law
913 Franklin, Suite 510
Houston, TX 77002

Gentlemen:

You are hereby notified that, in the case of FREDERICK J. HOPMANN vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY our No. 1210, from Harris County, the following decision and order was this day made and entered by this Court:

Motion Docket No. 2900:

"Appellant's Motion for Rehearing having been duly considered, it is ORDERED that said motion be, and hereby is overruled."

Respectfully yours,

/s/ BARBARA A. HOLMAN
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-163

FREDERICK J. HOPMANN,
Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondent

On Petition For Writ Of Certiorari To The Court of Civil Appeals For The Twelfth Supreme Judicial District Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

LIST OF AUTHORITIES

CASES

IN THE

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---

BRIEF FOR RESPONDENT IN OPPOSITION

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Southern Pacific Transportation Company, Respondent herein, prays the Court deny the petition and submits its Brief in Opposition.

OPINION BELOW

The opinion is printed in Appendix A, page A-1. *Hopmann v. Southern Pacific Transportation Co.*, 581 S.W.2d 532 (Tex. Civ. App.—Tyler, 1979).

JURISDICTION

Respondent asserts that Petitioner has not exhausted his state remedies and, therefore, may not invoke jurisdiction under 28 U.S.C. § 1257(3). This case deals with an interlocutory order involving venue; by definition, it is not a final judgment or decree as required by 28 U.S.C. § 1257(3), on which Petitioner relies.

Petitioner alleges, in part, that by virtue of Texas Revised Civil Statutes (T.R.C.S.), Article 1821, § 5, he has obtained a decision from the highest court in Texas having jurisdiction over this matter. Respondent would show that he has not.

All proceedings to date are prior to trial on the merits and to the entry of a finel judgment in this case. In the case of *Barron v. James*, 145 Tex. 283, 198 S.W.2d 256 (Tex. Sup. 1946), the Texas Supreme Court specifically construed T.R.C.S. Article 1821, § 5 to apply only to appeals from interlocutory orders, and held that it had jurisdiction to review the venue question when properly brought up on appeal from a judgment on the merits. The court also stated:

> ". . . while petitioners could have prosecuted an appeal from the order overruling their plea of privilege, they were not required to do so, but were entitled by proper exception to have the ruling of the trial court on the plea of privilege considered on the appeal from the final judgment . . ." *Barron*, supra, at p. 259.

In a very recent Texas Case, appellant attempted to take an appeal from an adverse interlocutory order on a venue question, as Petitioner here has done, but failed to timely perfect the appeal. After trial on the merits, appeal was taken from the final judgment, bringing along for review the venue question. That court held that the matter could be considered on appeal from the final judgment. *Southwestern Bell Telephone Co. v. Thomas*, 535 S.W.2d 686 (Tex. Civ. App.—Corpus Christi, 1976, reversed on other grounds, 554 S.W.2d 672 [Tex. Sup., 1977]), at p. 689. Also in accord is *Reynolds v. Groce-Wearden Co.*, 250 S.W.2d 749 (Tex. Civ. App.—San Antonio, 1952).

These cases clearly demonstrate that Petitioner has not obtained a final judgment from the highest court in Texas from which a decision may be had; thus Petitioner has not exhausted his state remedies, and this Court should decline jurisdiction.

QUESTION PRESENTED

Whether the Texas venue statute, purely procedural in nature, denies to Petitioner any substantial federal rights granted under the Federal Employer's Liability Act, 45 U.S.C., § 56.

STATEMENT OF THE CASE

Respondent substantially agrees with Petitioner's statement of the case with the exception that the opinion

below did not hold that the Texas venue statute took precedence over the venue provisions of the Federal Employer's Liability Act; the court simply held that the federal venue provision applies to actions filed in the federal courts, while state venue rules apply to actions filed in the state courts.

ARGUMENT

The exact question presented in this case, including the constitutional issue, was raised in *Missouri Pacific Ry. Co. v. Little,* 319 S.W.2d 785 (Tex. Civ. App.—Houston, 1958, cert. denied, 80 S.Ct. 69). This court saw fit to deny the petition in that case and should do so again.

In *Little,* supra, the railroad moved for a change of venue, citing the same Texas statute questioned here. The trial court refused to transfer and the railroad appealed. In a scholarly and well-reasoned opinion, the court noted that the plaintiff is afforded the opportunity to file suit in either state or federal court and that the Congress, in § 56, has prescribed venue for cases in the United States District Courts. The court then stated, at page 789:

> "If the injured employee chooses to sue in the state court . . ., then his suit is subject to the impartial and nondiscriminatory venue statutes of the state."

In interpreting the Federal statute in question, 45 U.S.C. § 56, the Court observed:

> "It is perfectly obvious that in the first sentence of the second paragraph the Congress was undertaking to establish the venue of suits under the Federal Employer's Liability Act brought in 'a District Court of the United States.' Nothing is said concerning the venue of an action that is brought in a state court." *Little,* supra, page 787.

In *Miles v. Illinois Central Ry. Co.,* 315 U.S. 698, 62 S.Ct. 827, 830, 86 L.Ed. 1129 (1942), Mr. Justice Reed, delivering the opinion of the Court, stated:

> "Words were simultaneously adopted recognizing the jurisdiction of the State courts by providing that the Federal jurisdiction should be concurrent. *The venue of the State court suits was left to the practice of the forum." Miles,* supra, at page 830. (emphasis added)

In *Burnett v. New York Central Railway Co.,* 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), this Court dealt with an F.E.L.A. case from Ohio involving a state venue statute almost identical to the Texas statute. That case was presented on a limitations question, but the Court tacitly approved the Ohio statute. 380 U.S. at page 431.

All these cases illustrate the well-settled doctrine that when a case involving federal law is tried in the state court, the substantive federal law applies, while the procedural law of the state court is followed.

The three cases cited by Petitioner are not in point. In *Arnold v. Panhandle and Santa Fe Railway Co.,* 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), venue was not an issue. The federal right asserted in that case was the right to recover under conflicting jury findings and not the procedural question of venue.

In *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 (1934), the Alabama Court had refused to entertain the F.E.L.A. litigation, denying *jurisdiction* of its courts to the plaintiff. No venue question was involved. In *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), the question at issue was the validity of a purported release given by plaintiff prior to trial, and whether his employer had obtained it by fraudulent means. None of the cases cited involve venue questions; none are even remotely pertinent to the question presented by Petitioner.

Respondent readily concedes that a state cannot deprive its citizens of substantial rights granted by federal law. No such deprivation exists by reason of the Texas venue statute here. It is clear that Congress intended the states to have the right to prescribe the venue for the prosecution of Federal Employer's Liability Act suits in the state courts.

CONCLUSION

Respondent respectfully prays that the writ be denied.

Respectfully submitted,

By: _____

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(713) 222-0062
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, John J. Corrigan, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1979, I served copies of the foregoing Respondent's Brief on opposing counsel by mailing copies in duly addressed envelopes, with first class postage prepaid, to James H. Brannon, attorney for Petitioner, at 810 Houston Bar Center Building, 723 Main Street, Houston, Texas 77002.

_____

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APPENDIX A

IN THE COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT
OF TEXAS

TYLER, TEXAS

NO. 1210

FREDERICK J. HOPMANN, Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellee

Appeal From The 113th Judicial District Court
Of Harris County, Texas

This is a venue case. Appellant, Frederick J. Hopmann, brought suit in the district court of Harris County, Texas, under the Federal Employer's Liability Act, 45 U.S.C.A., subsection 51, et seq., seeking to recover damages for personal injuries sustained while employed as a brakeman for appellee, Southern Pacific Transportation Company. The incident was alleged to have occurred on June 23, 1977, at Luling, Caldwell County, Texas. Appellant alleged in his petition that he was a resident of Bexar County, Texas, at the time of the occurrence in question and that the appellee was a railroad cor-

poration engaged in interstate commerce doing business in Harris County, Texas, where it maintained its offices and place of business.

Appellee duly filed a plea of privilege to have the cause transferred to Caldwell County, Texas, or in the alternative, to Bexar County, Texas, relying upon Article 1995, subdivision 25, Vernon's Annotated Texas Civil Statutes. Appellant responded with a controverting affidavit alleging that under Article 1995, supra, venue was properly laid in Harris County due to the fact that appellant does business in Harris County and maintains its offices and principal place of business there. After a hearing before the court, without a jury, the trial court sustained Southern Pacific's plea of privilege and ordered that the cause be transferred to Bexar County, Texas, from which order appellant perfected this appeal.

On the venue hearing, it was stipulated that: (1) plaintiff was employed by defendant, Southern Pacific Transportation Company, on the date of his alleged injury on July 23, 1977; (2) the injury occurred in Caldwell County, Texas; (3) at the time of his injury plaintiff was a resident of Bexar County, Texas; (4) that at all times material to this suit Southern Pacific Transportation Company was doing business in Harris County, Bexar County and Caldwell County; (5) that for the purpose of venue only, it was stipulated that plaintiff's pleading alleged a cause of action for venue purposes under the Federal Employer's Liability Act, and that all necessary facts to support the pleading had been established; and (6) that if the plea of privilege was sustained by the trial court, it was stipulated that plaintiff's suit would be transferred to Bexar County, Texas.

Under the first point, appellant contends that the trial court erred in transferring the cause to Bexar County because federal law governs, and under Title 45, U.S.C.A., subsection 56, this suit was properly brought in Harris County.

Subsection 56 of the Federal Employer's Liability Act provides, in part, as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Appellant takes the position that since the Act provides that the jurisdiction of the federal and state courts shall be concurrent, the state courts are obligated to apply the venue provisions provided by the Act. He argues that the right to select the forum and maintain suit in any county where appellee does business, is a substantial right granted by congress, and to apply subdivision 25 of the Texas Venue Statute would deny him that right and would thwart the express purpose of the Federal Employer's Liability Act.

The railroad company, on the other hand, contends that venue is controlled by subdivision 25 of Article 1995, supra, the material part of which reads as follows:

> "25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for

damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. . . ."

In our view, the precise issue now presented was previously decided in Missouri Pacific Ry. Co. v. Little, 319 S.W.2d 785 (Tex. Civ. App.—Houston 1958, no writ history, cert. den., 80 S.Ct. 69, 194). In the Little Case, the railroad employee brought suit against his employer for personal injuries sustained in McLennan County, Texas. At the time of the accident, plaintiff was a resident citizen of McLennan County, and his injuries occurred while he and his employer were engaged in interstate commerce. The action was brought under the Federal Employer's Liability Act and suit was filed in Houston, Harris County, Texas. At the state district court level, the plaintiff's employer, Missouri Pacific Ry. Co., sought, by way of plea of privilege, to remove the cause to the county in which the plaintiff resided and in which he sustained the injury. Missouri Pacific based its contention on Article 1995, subdivision 25, supra, just as the appellant does in this case. The district court overruled the railroad's plea of privilege and the railroad appealed. The Houston Court of Civil Appeals reversed the case and ordered the cause transferred to McLennan County. In holding that subdivision 25 of the Texas Venue Statute (Article 1995) was controlling and that the venue provisions of section 56 of the Federal Employer's Liability Act were not applicable to suits filed in state courts, the court of civil appeals stated at page 787:

"It is perfectly obvious that in the first sentence of the second paragraph of Section 56 the Congress

was undertaking to establish the venue of suits under the Federal Employers' Liability Act brought in '*a district court of the United States.*' (Emphasis supplied.) Nothing is said concerning the venue of an action that is brought in a state court.

"The legal doctrine that the clear expression of the one excludes the other is so ancient that it comes down to us in the time-honored maxim 'expresso unius est exclusio alterius.'

"After prescribing venue in the United States courts, Section 56 then provides, 'The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.' This provision is concerned with jurisdiction, not venue."

In support of its decision the court of civil appeals cited the case of Miles v. Illinois Central Ry. Co., 1942, 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, involving a Federal Employer's Liability Act case, wherein the court stated at page 788:

" 'Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. *The venue of state court suits was left to the practice of the forum.*' (Emphasis ours.)"

In Baltimore & Ohio Ry. Co. v. Kepner, 1941, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, the Supreme Court held that a state could not validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employer's Liability Act in the federal court of another state, since under the supremacy clause the venue section of the federal Act was controlling. While the ruling in that

regard is irrelevant to the present inquiry, it is significant to note that in the course of the opinion the Supreme Court made this statement at page 9 of 62 S.Ct.: "*Section 6 (45 U.S.C.A. sec. 56) establishes venue for an action in the federal courts.*" (Emphasis ours.)

We have found no case, and have been cited none, holding that venue provisions of sec. 56 of the federal statute is applicable to actions filed in a state court. The statements made by the United States Supreme Court in the cases cited above clearly indicate that Section 56 of the Act is to be interpreted as establishing venue for an action in the federal courts and that venue in state court actions are controlled by the venue statutes of the forum. Since appellant filed his suit in the Texas court, the federal venue statute was not applicable. Accordingly, appellant's first point is overruled.

Under the second point, appellant contends that the provisions of subdivision 25 of Article 1995, supra, are not mandatory but were enacted for the benefit of the plaintiff, thus giving him a right to elect to either follow subdivision 25 or to sue appellant at its domicile in Harris County.

It has long been the law in this state that subdivision 25 of Article 1995 is mandatory and that suits controlled by this subdivision must be commenced in the particular county mentioned therein without reference to whether or not it is the domicile of the defendant. Lewis v. Gulf, C. & S.F. Ry. Co., 229 S.W.2d 395 (Tex. Civ. App.—Galveston 1950, writ dism'd); Texas & N.O.R. Co. v. Tankersley, 246 S.W.2d 253 (Tex. Civ. App.—San Antonio 1952, no writ); Missouri Pacific Ry. Co. v. Little, supra; see also Kinney v. McCleod, 9 Tex. 78 (1852).

In Lewis v. Gulf, C. & S.F. Ry. Co., supra at 397, the Galveston court summarized the rights of the parties under the mandatory provisions of Article 1995 in the following language:

> "It is well settled that if a suit is brought under the provisions of any of the mandatory subdivisions above referred to, the defendant is entitled to have the case transferred to the county provided for in such mandatory provision, regardless of defendant's residence, upon the filing of the proper plea."

Applying the foregoing rules of law to the facts of the present case, it is obvious that appellant cannot maintain venue in Harris County, Texas, in face of the mandatory provision of the Texas statute providing otherwise. Appellant's second point of error is overruled.

By the third and final point, appellant argues that if subdivision 25 of Article 1995 is mandatory, then it is unconstitutional because it denies substantial federal rights. Specifically, he contends that if subdivision 25 is mandatory it is unconstitutional because it not only deprives him of one of the substantial rights given to him by the federal Act, but also it discriminates against him and causes a lack of uniformity in the application of the federal Act. However, no authority is cited for this proposition. After considering appellant's argument, we are convinced that it is without merit.

The F.E.L.A. claimant is given the election to sue in the federal court or the state court. Where he chooses to sue in the federal court, the right to select the forum granted by the federal statute constitutes a substantial right which the various states may not defeat. Boyd v. Grand Trunk Western Ry Co., 338 U.S. 263, 70 S.Ct.

26, 94 L.Ed. 55 (1949); Missouri Pacific Railroad Company v. Little, supra. The substantial right granted, however, applies only to the right to maintain venue in accordance with the federal Act in cases filed in the federal courts. Where the injured employee chooses to sue in the state courts, his suit is subject to the venue statutes of the state. Miles v. Illinois Central Ry. Co., supra; Missouri Pacific Ry. Co. v. Little, supra. It is clear that the Congress did not intend to give the F.E.L.A. claimant who files in the state court the same venue rights as those provided for in suits in the federal court, otherwise the Congress would have said so. When appellant elected to file his suit in the state court, he no longer had federal venue rights subject to protection. Consequently, the application of the Texas venue statute would not defeat or curtail any of the appellant's federal venue rights. Since the Texas venue statute deprived him of no federal right, it follows that it could not be unconstitutional and void on such grounds.

Further, we find that we are unable to agree with appellant's contention that the mandatory provisions of subdivision 25 of Article 1995 renders the Texas statute discriminatory and in violation of the 14th Amendment of the Constitution of the United States. This same question was addressed by the Court in Missouri Pacific Ry. Co. v. Little, supra. After reviewing the Texas statute in question, the court in that case concluded, at page 788, that the statute fully protects the plaintiff and could not, in any way, be construed as discriminatory. After a careful review of the statute, we are convinced that the court in that case reached the proper result and that the statute should not be struck down on that basis.

It follows from what we have said that we are of the opinion that appellant had no legal or constitutional right to maintain venue in Harris County, Texas.

Accordingly, the judgment of the trial court is affirmed.

JAMES H. MOORE
Associate Justice

Opinion delivered May 3, 1979.

APPENDIX B

FEDERAL STATUTES

§ 1257. State courts; appeals; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and he decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

§ 56 Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the resi-

dence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

TEXAS STATUTES

Art. 1821. [1591] [996] Judgment conclusive on law

Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute.

2. All cases of slander.

3. All cases of divorce.

4. All cases of contested elections of every character other than for State officers, except where the validity of a Statute is questioned by the decision.

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

6. In all other cases as to law and facts except where appellate jurisdiction is given to the Supreme Court and not made final in said Courts of Civil Appeals.

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728. Acts 1st C.S. 1892, p. 25; Acts 1923, p. 110; Acts 1929, 41st Leg., p. 68, ch. 33, § 1; Acts 1953, 53rd Leg., p. 1026, ch. 424, § 2.

Art. 1995. [1830] [1194] [1198] Venue, general rule

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

* * *

25. Railway personal injuries.—Suits against railroad corporations, or against any asignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said

suit, shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

* * *

APPENDIX C

NO. 1210

IN THE COURT OF CIVIL APPEALS
FOR THE TWELFTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT TYLER

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Appellee

APPEALED FROM THE 113TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

BRIEF FOR APPELLEE

W. T. Womble
H. Daniel Spain

Attorneys for Appellee,
Southern Pacific
Transportation Company

PRINTER'S NOTE:
Index for Brief Omitted

NO. 1210

IN THE COURT OF CIVIL APPEALS
FOR THE TWELFTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT TYLER

FREDERICK J. HOPMANN,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Appellee

APPEALED FROM THE 113TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

BRIEF FOR APPELLEE

TO THE HONORABLE COURT OF CIVIL APPEALS:

NATURE OF THE CASE

This is an action brought by Appellant under the Federal Employers Liability Act, 45 U.S.C.A. Subsection 51, et. seq. in which he seeks to recover damages resulting from personal injuries sustained while he was per-

forming his duties as a brakeman for the Southern Pacific Transportation Company. This incident allegedly occurred on June 23, 1977, at Luling, Caldwell County, Texas; Appellant alleged to have resided in Bexar County, Texas, at the time of the occurrence in question; suit was filed by his Houston attorneys in the State District Court of Harris County, Texas, on December 29, 1977.

Appellee duly filed a Plea of Privilege to have the cause transferred to Caldwell County, Texas, or in the alternative, to Bexar County, Texas, relying upon Article 1995, Subdivision 25, Revised Civil Statutes of Texas. (Tr. 6) Appellant responded with its Controverting Affidavit (Tr. 11) and on February 27, 1978, the Plea of Privilege was heard before the 113th Judicial District Court of Harris County, Texas. The Court sustained Appellee's Plea of Privilege and ordered that the cause be transferred to Bexar County, Texas. (Tr. 14) From such order Appellant has perfected this appeal.

COUNTERPOINTS

Counterpoint One

THE TRIAL COURT DID NOT ERR IN HOLDING THAT TEXAS LAW APPLIES AND IN SUSTAINING APPELLEE'S PLEA OF PRIVILEGE PURSUANT TO ARTICLE 1995, SUBDIVISION 25 OF THE REVISED CIVIL STATUTES OF TEXAS BECAUSE SUIT WAS FILED IN STATE DISTRICT COURT. (Germane to Appellant's First Point of Error.)

Counterpoint Two

ARTICLE 1995, SUBDIVISION 25, REVISED CIVIL STATUTES OF TEXAS IS A MANDATORY VENUE

STATUTE AND SUPERSEDES THE GENERAL VENUE PROVISION IN PERMISSIVE VENUE PROVISIONS IN ALL CASES. (Germane to Appellant's Second Point of Error.)

Counterpoint Three

ARTICLE 1995, SUBDIVISION 25 IS CONSTITUTIONAL BECAUSE IT DOES NOT DEFEAT THE EFFECTIVE ENJOYMENT OF ANY FEDERAL RIGHT. (Germane to Appellant's Third Point of Error.)

Counterpoint One (Restated)

THE TRIAL COURT DID NOT ERR IN HOLDING THAT TEXAS LAW APPLIES AND IN SUSTAINING APPELLEE'S PLEA OF PRIVILEGE PURSUANT TO ARTICLE 1995, SUBDIVISION 25 OF THE REVISED CIVIL STATUTES OF TEXAS BECAUSE SUIT WAS FILED IN STATE DISTRICT COURT.

Argument and Authorities

The precise issue which this Court is now presented with was previously decided in *Missouri Pacific Ry. Co. v. Little,* 319 S.W.2d 785 (Tex. Civ. App.—Houston, 1958, cert. den., 80 S.Ct. 69), and to this day is still the law in Texas. In the *Little* case, a railroad employee brought suit against his employer for personal injuries sustained in McLennan County, Texas. At the time of the accident, plaintiff was a resident citizen of McLennan County and his injuries occurred while he and his employer were engaged in interstate commerce. The action was brought under the Federal Employers Liability Act

and suit was filed Houston, Harris County, Texas. At the State District Court level the plaintiff's employer, Missouri Pacific Railroad Company, argued by way of Plea of Privilege to remove the cause to the county in which the plaintiff resided, and in which the plaintiff's injury occurred. Missouri Pacific based its contentions on Article 1995, Subdivision 25, Revised Civil Statutes of Texas which pertains exclusively to railway personal injuries. The Harris County District Court overruled the railroad's Plea of Privilege and the railroad appealed.

The Court of Civil Appeals at Houston, Judge Werlein presiding, held that the venue section of the Federal Employer's Liability Act describes venue for suits filed in the District Courts of the United States, and not for those filed in State Court. The proposition which naturally flows from this determination is that if the injured employee chooses to sue in the State Court, in the county where he resided or was injured, then his suit is subject to the venue statutes of the State. The Court of Civil Appeals reversed and remanded with instructions to sustain the railroad's Plea of Privilege and to transfer the cause to McLennan County.

Notwithstanding the clarity of Texas law on this subject as espoused in the *Little* case, Appellant contends that the trial court erroneously sustained Appellee's Plea of Privilege because Title 45, U.S.C.A., Subsection 56 properly places venue in Harris County, Texas. Appellant is wrong. Subsection 56 provides for concurrent jurisdiction between the courts of the United Stats and of the state courts but delineates venue provisions only as to the courts of the United States (i.e. federal courts). Subsection 56 reads as follows:

> "No action shall be maintained under this chapter unless commenced within three years from the date the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent to that of the courts of the several states."
>
> 45 U.S.C.A. Subsection 56.

The language of Subsection 56 was clear enough to the Court in the *Little* case to enable it to dispel the argument that the venue provisions applied to suits filed in state district court. In Judge Werlein's own words, "It is perfectly obvious that in the first sentence of the second paragraph the Congress was undertaking to establish the venue of suits under the Federal Employers Liability Act brought in 'a district court of the United States.' Nothing is said concerning the venue of an action that is brought in a state court." *Id.* at p. 787.

Perhaps the Appellant is confusing venue with the concurrent jurisdiction provided for in Subsection 56 which presents to the plaintiff the choice of filing suit in either federal district court or state district court. Appellant exercised his choice and chose to file suit in state district court, albeit the wrong one.

With Appellant's decision to file his suit in state court there comes the burdens and advantages of the laws of the State of Texas. There is ample authority for the proposition that where an accident is brought under the Fed-

eral Employers Liability Act in Texas state court, the Texas Rules of Civil Procedure, and not the Federal Rules of Civil Procedure control. The leading case in this regard is *Thompson v. Robbins,* 157 Tex. 463, 304 S.W. 2d 111 (1957), which involved a suit based on the Federal Employers Liability Act and filed in state court. The court was posed with the same question which is asked in the present case, whether all Federal Employers Liability Act cases are to be tried in accordance with the rules of civil procedure of the state where the action is filed, or in accordance with the Federal Rules of Civil Procedure. The Supreme Court unequivocally stated that "The plaintiff invoked the jurisdiction of the state courts and the case should be tried as any other suit for damages is tried in the state courts so far as procedural matters are concerned." *Id.,* at p. 117.

The Texas Supreme Court reiterated this position in 1973 in the case of *Missouri Pacific Ry. Co. v. Cross,* 501 S.W.2d 868, 870 (Tex. 1973). Under facts similar to those in the *Thompson* case, supra, the Court determined that the Federal Employers Liability Act prescribes substantive rights of parties in cases under its provisions, but when such cases are filed in state courts, they are generally to be tried in accordance with state's own rules of civil procedure.

It is settled then that a suit based on the Federal Employers Liability Act, and filed in state court invokes the law of the State. The United States Supreme Court, in just such a case, addressed the more precise issue of which law controls venue, federal law or the state law. In *Miles v. Illinois Central Ry. Co.,* 315 U.S. 698, 62 S.Ct. 827, 830, 86 L.Ed. 1129, at page 830, Mr. Justice

Reed, in delivering the opinion of the court, made this significant statement:

> "Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of the state court suits was left to the practice of the forum."

The *Miles* decision was cited favorably by Judge Werlein in the *Little* decision, at page 788, and made use of the *Miles* rationale to justify his application of Subdivision 25 of Article 1995 of the Revised Civil Statutes of Texas to sustain the railroad's Plea of Privilege.

Appellant cites *Boyd v. Grand Trunk Western Ry. Co.,* 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1948), for the proposition that the right to select the form granted in Subsection 6 is a substantial right. It should be noted that the only issue in the *Boyd* case involved the validity of a contract restricting the choice of venue for an action based upon the Federal Employers Liability Act; this case does not address the issues presented in the present case. There is no question that Article 45 U.S.C.A., Subsection 56 provides for venue when suit is filed in the United States District Court, and that such right is significant, but, once again, the present suit was filed in state court by choice of the Appellant.

Appellant also relies upon *Texas & P. Ry. Co. v. Younger,* 262 S.W.2d 557 (Tex. Civ. App.—Ft. Worth, 1953, writ ref. n.r.e.), in his argument that certain rights of the Federal Employers Liability Act are substantial. Appellant failed to mention that the *Younger* case had at issue Section 51 of the Federal Employers

Liability Act. Section 51 provides that a railroad shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce, if the injury results, in whole or in part, from the negligence of any employee of the carrier or by reason of any defect or insufficiency, due to its negligence, in its cars or other equipment. In that case, the question was whether or not the inclusion of the words "in whole or in part" in a special issue on proximate cause was prejudicial error. The court determined that the rights afforded by Section 51 was a substantive right, and that such rights may not be impaired by any local statute, rule, or local practice. Again, the opinion in the *Younger* case makes absolutely no mention of the issue at bar, that being proper venue.

Appellant's arguments are aptly made, although misdirected. He has brought forth no cases to support his contentions, but has resorted to policy argument. Such arguments are not persuasive, and to accept them would be to fly in the face of existing case law at both the state and federal levels.

Counterpoint Two (Restated)

ARTICLE 1995, SUBDIVISION 25, REVISED CIVIL STATUTES OF TEXAS IS A MANDATORY VENUE STATUTE AND SUPERSEDES THE GENERAL VENUE PROVISION AND PERMISSIVE VENUE PROVISIONS IN ALL CASES.

Argument and Authorities

Appellant further contends that the Texas venue statute (Article 1995, Subdivision 25 Revised Civil Statutes of

Texas) is not a mandatory venue provision because it inures only to the benefit of the plaintiff. This contention is clearly erroneous and contradicts both the statute on its face and the case law which has interpreted it. Subdivision 25 is a mandatory venue statute and in its application the courts do not discriminate between plaintiff and defendant. The text of Subdivision 25 is as follows:

> 25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, *shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury*. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State, then such suits shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office." Article 1995, Subdivision 25, Revised Civil Statutes of Texas (emphasis added).

The subdivisions of Article 1995 may be divided into two classes, those subdivisions which are permissive or

"may" subdivisions, under which suit may be brought either in the county of the defendant's residence or in the county provided for under the permissive or "may" subdivision, and those subdivisions of the statute which are mandatory ("must" or "shall" subdivisions) which, upon proper plea by either party, require that the suit be brought in a particular county, regardless of the residence of the defendant. From the face of the statute it is apparent that Subdivision 25 is a "shall" mandatory provision.

It has been decided in Texas that when an Article 1995 exception directs that a suit must or shall be brought in a particular county (as does Subdivision 25), the requirement is mandatory and controls over other exceptions as well as the general rule. *Texas & N.O.R. Co. v. Tankersley,* 246 S.W.2d 253 (Tex. Civ. App.—San Antonio, 1952, no writ). The *Tankersley* case involved an action for personal injuries sustained by plaintiff while a passenger of the defendant railroad. The issue was whether Subdivision 24, which is a permissive venue section pertaining to carriers, or Subdivision 25 was applicable to establish venue. The court sustained the railroad's Plea of Privilege transferring the cause to the county where the injury occurred and said of Subdivision 25, "Since Subdivision 25 is mandatory, we think that it is the one which fixes the venue for Appellee's suit for damages against a railroad corporation for her claimed damages arising from personal injuries." *Id.,* at p. 254.

The court again squarely faced this question in the now widely cited opinion of *Lewis v. Gulf, Colorado & S.F. Ry. Co.,* 229 S.W.2d 395 (Tex. Civ. App.—Galveston, 1950, writ dism'd.). This case was an action

for the recovery of damages for personal injuries sustained in Hardin County, Texas, while plaintiff was an employee of the defendant railroad. Suit was filed in Galveston County in which the railroad has its domicile, office and place of business. The railroad filed its Plea of Privilege to have the cause transferred to Hardin County pursuant to Subdivision 25 of Article 1995, thus presenting the court with the precise question which is now before us; whether a suit which involves a mandatory subdivision (Subdivision 25) of Article 1995, requiring that a suit must be commenced in a particular county without reference to whether or not it is the domicile of the defendant, must be transferred to the county covered by the mandatory subdivision upon the filing of the proper Plea of Privilege by the defendant. The court experienced no difficulty in determining that Subdivision 25 is mandatory and must be applied, but went further in expressly approving the applicability of Subdivision 25 when urged by a defendant. Citing numerous authorities, going back to the early case of *Kinney v. McCleod,* 9 Tex. 78, the court disposed of the issue and ruled in favor of the railroad, summarizing the law in one sentence:

> "It is well settled that if a suit is brought under the provisions of any of the mandatory subdivisions above-referred to, the defendant is entitled to have the case transferred to the county provided for in such mandatory provision, regardless of the defendant's residence, upon the filing of the proper plea." *Lewis,* supra at p. 397.

The *Little* case, supra, which parallels the present case deals a final blow to Appellant's argument concerning Subdivision 25. The *Little* court cited the *Lewis* decision as being the authority of Texas law concerning the man-

datory nature of Subdivision 25. The court did not beg the issue, and, after only citing the *Lewis* decision sufficed it to say that

> "We need not discuss further the decisions of the Texas courts holding that Subdivision 25 of Article 1995 is mandatory, . . ." *Little,* at p. 787.

Faced with conclusive authority contradictory to his position, Appellant still chose to argue that the law is wrong. His attempts to do so are shallow and without substance. His first attempt at disparaging the law was in his reliance upon *Warren v. Denison,* 531 S.W.2d 215 (Tex. Civ. App.—Amarillo, 1975, no writ hist.) from the context of which he plucked the observation that the exceptions to the general venue provision are generally recognized to be for the benefit of the plaintiff, not the defendant. These generalities to which Appellant chooses to resort are less than authoritative. The courts of Texas have without hesitation, extended the availability of Subdivision 25 to both plaintiff and defendant, without discrimination. *Little,* supra; *Lewis,* supra.

Appellant next cites a 1946 compensation suit which he apparently felt supported his position that Subdivision 25 was not mandatory. A portion of the opinion which Appellant cites in his brief makes it clear that this is not the case:

> ". . . We find it is a protective statute which guarantees Appellee venue in its home county, *if the exceptions set out in said section are not applicable." Commercial Standard Ins. Co. v. Texas & N.O.R. Co.,* 198 S.W.2d 913 (Tex. Civ. App.—Ft. Worth, 1946, no writ hist.).

It has been conclusively established that the mandates of Subdivision 25 do apply in the present case, therefore *Commercial Standard* has no application.

Finally, Appellant attempts to rationalize to the court as an applicable decision the case of *Fouse v. Gulf C. & S.F. Ry. Co.,* 193 S.W.2d 241 (Tex. Civ. App.—Ft. Worth, 1946, no writ hist.). The case is clearly inapplicable to the present fact situation even though the nature of Subdivision 25 was examined. In *Fouse,* plaintiff filed suit in Tarrant County to recover for injuries sustained in an accident which occurred in Johnson County. The defendant railroad responded with a Plea of Privilege to be sued in Galveston County, the county of its domicile. Plaintiff, in his Controverting Affidavit, stated that in the event that venue of the cause was not properly laid in Tarrant County, then the proper and only other county wherein venue lies is in Johnson County, which has the exclusive jurisdiction of the suit under Subdivision 25. Herein is where *Fouse* differs from the present case. The plaintiff chose Tarrant County as his forum, and may not, by Controverting Plea, transfer the cause to another county. The court sustained the railroad's Plea of Privilege and transferred the cause to Galveston County, but used the following language as its reasoning:

> "It appears very obvious to us that, when a Plea of Privilege is filed by a defendant, there remains but one right, as to venue, vested in the plaintiff, and that is, by a Controverting Plea, he may establish his right to maintain his suit *in the court and in the county where he filed it. Id.,* at p. 243.

The only thing that *Fouse* holds is that once plaintiff chooses to file suit in a court in which venue does not lie, he may not later seek to transfer venue.

That Appellant's arguments are unfounded is an inescapable conclusion. The law is well settled in Texas that Subdivision 25 is a mandatory venue statute which supersedes the general venue provision, and which must be applied without regard to one's position as plaintiff or defendant.

Counterpoint Three (Restated)

ARTICLE 1995, SUBDIVISION 25 IS CONSTITUTIONAL BECAUSE IT DOES NOT DEFEAT THE EFFECTIVE ENJOYMENT OF ANY FEDERAL RIGHT.

Argument and Authorities

That Article 1995, Subdivision 25 of the Revised Civil Statutes of Texas is constitutional is beyond question. Subdivision 25 was enacted in its present form in 1911, and has not been amended for constitutional reasons or any other reason since its inception. Vernon's Civil Statutes 1914 (Rev. Civ. Stat. 1911) art. 1830. Thus, the law on venue for railroad personal injuries, as mandated by Subdivision 25, has been applied without question for more than half a century. Nevertheless, Appellant now argues that even if Subdivision 25 is mandatory, it is unconstitutional because it denies Plaintiff a substantial federal right.

The precise issue of Subdivision 25's constitutionality in regard for federal law has been addressed by the

courts of this state. In *Little,* supra, which runs as a thread through all of the arguments here presented because of its identity to the present case, upholds Subdivision 25 as constitutional. The court stated very succinctly that:

> "There can be no question that the State of Texas and its courts administer and enforce Section 25, Article 1995, Vernon's Annotated Civil Statutes, prescribing venue in suits brought against a railroad, impartially and without discrimination between Federal Employers Liability Act cases and other cases in which a railroad is sued, whether such cases are interstate or intrastate.
>
> . . . (Subsection 25) fully protects the plaintiff and does not in any way deprive him of any right given him by the federal statute." *Little,* at p. 788.

The *Little* court conceded that a state cannot deprive one of the enjoyment of a federal right, but made the following very profound statement:

> "We grant that the State cannot defeat the effective enjoyment of your federal right given a citizen by a technical or local procedural device, but this rule has no application where no legal right is either defeated or curtailed. There can be no conceivable reason why the state should not have the right in such case to prescribe the venue governing the prosecution of such suit. It is clear that the Congress intended that the state should have such right." *Little,* at p. 788, 89.

Appellant bases his constitutional argument on a case which has absolutely nothing to do with venue. The case of *Arnold v. Panhandle & Santa Fe Ry. Co.,* 353

U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), stands for the proposition that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. As held by the court in *Little,* there is no question that this is a valid statement of the law. However, this rule has no application where no legal right is either defeated or curtailed. *Little,* supra, at p. 788.

Appellant has attempted to argue that Subdivision 25 is unconstitutional because it in some way denies a substantial federal right, but Appellant fails to state what "substantial federal rights" have been impinged. Appellant also, in a catch-all attempt to persuade the court with generalities, states that Subdivision 25 denies Due Process and violates the Equal Protection Clause of the United States Constitution, but again Appellant fails to say in what way. These constitutional arguments asserted by Appellant are not probative and are merely a last-ditch effort in a frivolous quest to overturn an entire body of law.

CONCLUSION AND PRAYER

Appellant has failed in his assault on the well-settled law in Texas that overwhelmingly supports the trial court's decision to sustain Appellee's Plea of Privilege. The trial court was presented with the same arguments and authorities that are brought forth in this appeal and, without hesitation, administered the law correctly. Appellant's zealous, and frivolous, attempts to eradicate a body of law which is so ingrained in the judicial system are beyond the bounds of reason.

Because Appellant failed to present authoritative support for his allegations, the trial court correctly sustained Appellee's Plea of Privilege. Accordingly, Appellee, Southern Pacific Transportation Company, respectfully prays that the judgment of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Brief was served upon W. Douglas Matthews, 810 Houston Bar Center Building, 723 Main Street, Houston, Texas 77002, attorney of record for Appellant, on the ____ day of July, 1978.

H. DANIEL SPAIN